

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

* * *

EDWARD LONDON,

Plaintiff,

Case No. 3:20-CV-0284-MMD-CLB

v.

CHARLES DANIELS, *et al.*,

Defendants.

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE¹

[ECF No. 32]

This case involves a civil rights action filed by Plaintiff Edward London (“London”) against Defendants Skyler Sheeks (“Sheeks”) and Luis Sencion-Gonzalez (“Gonzalez”) (collectively referred to as “Defendants”). Currently pending before the Court is Defendants’ motion for summary judgment. (ECF Nos. 32, 34.)² London opposed the motion, (ECF No. 39), and Defendants replied. (ECF No. 42.) For the reasons stated below, the Court recommends that Defendants’ motion for summary judgment, (ECF No. 32), be denied.

I. FACTUAL BACKGROUND

18 London is an inmate in the custody of the Nevada Department of Corrections
19 (“NDOC”). The events related to this case occurred while London was housed at the
20 Northern Nevada Correctional Center (“NNCC”). On October 9, 2019, London called a
21 man down due to trouble breathing and dizziness. (ECF Nos. 8 at 3; 32-1 at 2.)
22 Defendants Sheeks and Gonzalez, along with other officers, came to London’s cell and
23 shackled him at the waist to remove him for medical evaluation. (ECF Nos. 8 at 2-3; 32-
24 1 at 2.)

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²⁸ ECF No. 34 consists of London's medical records filed under seal.

1 In his verified complaint, London states the following, which is disputed by
 2 Defendants: when London was being removed from his cell, he complained that the cuffs
 3 on his wrists were too tight, and he refused to allow officers to shackle his feet. (ECF No.
 4 8 at 3.) Officer Sheeks then yanked the restraint and dragged London to the floor. (*Id.* at
 5 4.) Officer Gonzalez gouged London's eye and then stuck his fingers in London's mouth
 6 to try and gouge London's mouth. (*Id.* at 5.) London heard Gonzalez say, "you deserve it,
 7 she didn't," apparently in reference to London's reason for incarceration. (*Id.*) London
 8 believes that Sheeks and Gonzalez intended to use excessive force against him.

9 According to Defendants, the following occurred, which is disputed by London: On
 10 October 9, 2019, after calling a man down due to dizziness and shortness of breath,
 11 London submitted to waist restraints and was removed from his cell for evaluation. (ECF
 12 No. 32-1 at 2; 32-3 at 3.) When London was removed from his cell, officers attempted to
 13 put leg restraints on London, but he became actively noncompliant, physically aggressive,
 14 and refused to obey multiple direct orders, including attempting to kick officers. (ECF No.
 15 32-1 at 2.) A spontaneous, hands-on force was required to regain control of London and
 16 his leg restraints were applied. (*Id.*) London was resisting correctional officers when
 17 medical personnel arrived. (ECF No. 34-1 at 2 (sealed).) Once full restraints were applied
 18 to London, he was compliant. (ECF No. 32-3.) London complained that his right wrist
 19 restraint was too tight, and it was subsequently loosened. (*Id.* at 11.)

20 Medical evaluated London and noted he was intoxicated and agitated. (ECF No.
 21 34-1 at 2 (sealed).) Medical also noted a lower gum cut, an abrasion on London's left
 22 lower eye, and his right eye was swollen. (*Id.*) London was treated with a salty water
 23 solution for his gum laceration and an ice pack for his right eye, as well as overnight
 24 observation. (*Id.*) London had visible bruising on his face following the incident. (ECF No.
 25 32-3 at 2.)

26 On October 13, 2019, London called another man down for eye pain related to the
 27 altercation that occurred on October 9, 2019. (*Id.* at 12.) London reported to the Nurse
 28 that he continued to have blurry vision following the incident. (*Id.*) The Nurse reported that

1 London's "right sclera is red but no swelling or drainage present." (*Id.*) London was
2 instructed to kite for an eye doctor to conduct a further evaluation. (*Id.*)

3 On October 13, 2019, London filed an informal level grievance regarding the
4 alleged staff assault. (ECF No. 32-4 at 4-9.) On December 12, 2019, London filed a first
5 level grievance stating that NNCC was not following their own grievance procedure as it
6 took 61 days to respond to his informal grievance. (*Id.* at 3.) London's first level grievance
7 was not accepted because he changed the grievance's subject from an alleged staff
8 assault to the grievance procedure's response time, which was deemed an abuse of the
9 inmate grievance procedure. (*Id.* at 2.) London was explicitly told "Do **NOT** resubmit." (*Id.*
10 (emphasis in original).)

11 On October 15, 2019, London received a Notice of Charges for assault related to
12 the incident on October 9, 2019. (ECF No. 32-1 at 2.) London pled not guilty but admitted
13 "kicking with his feet." (*Id.* at 3-4.) Following a disciplinary hearing on December 10, 2019,
14 London was ultimately found guilty of assault. (*Id.* at 6.)

15 **II. PROCEDURAL HISTORY**

16 On May 13, 2020, London filed a civil rights complaint under 42 U.S.C. § 1983
17 alleging Defendants used excessive force against him while he was incarcerated at
18 NNCC. (ECF Nos. 1-1, 8.) On March 9, 2021, the District Court screened the complaint
19 and permitted London to proceed on an excessive use of force claim under the Eighth
20 Amendment against Defendants. (ECF No. 7.) London's claims for verbal harassment
21 and a Prison Rape Elimination Act ("PREA") violation were dismissed with prejudice. (*Id.*)
22 Finally, Defendants Charles Daniels, Perry Russell, and Lisa Walsh were dismissed from
23 the entirety of the case, without prejudice. (*Id.*)

24 Defendants answered the complaint on September 7, 2021. (ECF No. 17.)
25 Thereafter, the Court entered a Discovery Plan and Scheduling Order setting the
26 discovery cut-off on April 4, 2022. (ECF No. 22.) On March 4, 2022, Sheeks properly
27 served London with 14 interrogatories and 17 requests for admission related to his claims.
28 (ECF No. 26-2, 26-3.) London was required to respond to the interrogatories and requests

1 for admission by no later than April 4, 2022. Fed. R. Civ. P. 33(b)(2) and 36(a)(3). The
2 attorney for Defendants, Deputy Attorney General Ginn, set an appointment with London
3 to “meet and confer” on April 14, 2022. (ECF No. 26-1.) London stated at the meet and
4 confer that he had not completed the discovery responses. (*Id.*) The result of the meet
5 and confer was an agreement that defense counsel would not file a motion to compel until
6 April 19, 2022 to allow London an opportunity to provide answers to the propounded
7 discovery. (*Id.*) London did not serve responses. (*Id.*)

8 On April 19, 2022, Defendants filed a motion to compel London to answer the
9 interrogatories and deem the requests for admission admitted. (ECF No. 26.) The Court
10 granted Defendants’ motion to compel and ordered London to answer the interrogatories
11 and deemed the requests for admission as admitted. (ECF No. 29.) On June 3, 2022,
12 Defendants filed a motion requesting an order to show cause as to why London should
13 not be sanctioned for failing to answer discovery as ordered by the Court on May 12,
14 2022. (ECF No. 30.) The Court denied the motion and granted London additional time to
15 respond to Defendants’ discovery requests. (ECF No. 31.)

16 On July 7, 2022, Defendants filed their motion for summary judgment arguing this
17 case should be dismissed because: (1) London failed to exhaust his administrative
18 remedies; (2) London cannot prove an issue of material fact for his claim; (3) London
19 cannot prove officials acted maliciously and sadistically because London admits to
20 actively physically assaulting the Correctional Officers, being intoxicated, planning a
21 synchronized fictitious medical emergency, and failing to obey orders; and (4) NDOC
22 Employees are entitled to qualified immunity. (ECF No. 32.) London opposed the motion,
23 (ECF No. 39), and Defendants replied. (ECF No. 42.)

24 **III. LEGAL STANDARDS**

25 “The court shall grant summary judgment if the movant shows that there is no
26 genuine dispute as to any material fact and the movant is entitled to judgment as a matter
27 of law.” Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The
28 substantive law applicable to the claim determines which facts are material. *Coles v.*

1 *Eagle*, 704 F.3d 624, 628 (9th Cir. 2012) (citing *Anderson v. Liberty Lobby*, 477 U.S. 242,
 2 248 (1986)). Only disputes over facts that address the main legal question of the suit can
 3 preclude summary judgment, and factual disputes that are irrelevant are not material.
 4 *Frlekin v. Apple, Inc.*, 979 F.3d 639, 644 (9th Cir. 2020). A dispute is “genuine” only where
 5 a reasonable jury could find for the nonmoving party. *Anderson*, 477 U.S. at 248.

6 The parties subject to a motion for summary judgment must: (1) cite facts from the
 7 record, including but not limited to depositions, documents, and declarations, and then
 8 (2) “show[] that the materials cited do not establish the absence or presence of a genuine
 9 dispute, or that an adverse party cannot produce admissible evidence to support the fact.”
 10 Fed. R. Civ. P. 56(c)(1). Documents submitted during summary judgment must be
 11 authenticated, and if only personal knowledge authenticates a document (i.e., even a
 12 review of the contents of the document would not prove that it is authentic), an affidavit
 13 attesting to its authenticity must be attached to the submitted document. *Las Vegas*
 14 *Sands, LLC v. Neheme*, 632 F.3d 526, 532-33 (9th Cir. 2011). Conclusory statements,
 15 speculative opinions, pleading allegations, or other assertions uncorroborated by facts
 16 are insufficient to establish the absence or presence of a genuine dispute. *Soremekun v.*
 17 *Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007).

18 The moving party bears the initial burden of demonstrating an absence of a
 19 genuine dispute. *Soremekun*, 509 F.3d at 984. “Where the moving party will have the
 20 burden of proof on an issue at trial, the movant must affirmatively demonstrate that no
 21 reasonable trier of fact could find other than for the moving party.” *Soremekun*, 509 F.3d
 22 at 984. However, if the moving party does not bear the burden of proof at trial, the moving
 23 party may meet their initial burden by demonstrating either: (1) there is an absence of
 24 evidence to support an essential element of the nonmoving party’s claim or claims; or (2)
 25 submitting admissible evidence that establishes the record forecloses the possibility of a
 26 reasonable jury finding in favor of the nonmoving party. See *Pakootas v. Teck Cominco*
 27 *Metals, Ltd.*, 905 F.3d 565, 593-94 (9th Cir. 2018); *Nissan Fire & Marine Ins. Co. v. Fritz*
 28 *Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). The court views all evidence and any

1 inferences arising therefrom in the light most favorable to the nonmoving party. *Colwell v.*
 2 *Bannister*, 763 F.3d 1060, 1065 (9th Cir. 2014). If the moving party does not meet its
 3 burden for summary judgment, the nonmoving party is not required to provide evidentiary
 4 materials to oppose the motion, and the court will deny summary judgment. *Celotex*, 477
 5 U.S. at 322-23.

6 Where the moving party has met its burden, however, the burden shifts to the
 7 nonmoving party to establish that a genuine issue of material fact actually exists.
 8 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, (1986). The
 9 nonmoving must “go beyond the pleadings” to meet this burden. *Pac. Gulf Shipping Co.*
 10 *v. Vigorous Shipping & Trading S.A.*, 992 F.3d 893, 897 (9th Cir. 2021) (internal quotation
 11 omitted). In other words, the nonmoving party may not simply rely upon the allegations or
 12 denials of its pleadings; rather, they must tender evidence of specific facts in the form of
 13 affidavits, and/or admissible discovery material in support of its contention that such a
 14 dispute exists. See Fed.R.Civ.P. 56(c); *Matsushita*, 475 U.S. at 586 n. 11. This burden is
 15 “not a light one,” and requires the nonmoving party to “show more than the mere existence
 16 of a scintilla of evidence.” *Id.* (quoting *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387
 17 (9th Cir. 2010)). The non-moving party “must come forth with evidence from which a jury
 18 could reasonably render a verdict in the non-moving party’s favor.” *Pac. Gulf Shipping*
 19 Co., 992 F.3d at 898 (quoting *Oracle Corp. Sec. Litig.*, 627 F.3d at 387). Mere assertions
 20 and “metaphysical doubt as to the material facts” will not defeat a properly supported and
 21 meritorious summary judgment motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
 22 475 U.S. 574, 586–87 (1986).

23 When a *pro se* litigant opposes summary judgment, his or her contentions in
 24 motions and pleadings may be considered as evidence to meet the non-party’s burden to
 25 the extent: (1) contents of the document are based on personal knowledge, (2) they set
 26 forth facts that would be admissible into evidence, and (3) the litigant attested under
 27 penalty of perjury that they were true and correct. *Jones v. Blanas*, 393 F.3d 918, 923
 28 (9th Cir. 2004).

1 Upon the parties meeting their respective burdens for the motion for summary
 2 judgment, the court determines whether reasonable minds could differ when interpreting
 3 the record; the court does not weigh the evidence or determine its truth. *Velazquez v. City*
 4 *of Long Beach*, 793 F.3d 1010, 1018 (9th Cir. 2015). The court may consider evidence in
 5 the record not cited by the parties, but it is not required to do so. Fed. R. Civ. P. 56(c)(3).
 6 Nevertheless, the court will view the cited records before it and will not mine the record
 7 for triable issues of fact. *Oracle Corp. Sec. Litig.*, 627 F.3d at 386 (if a nonmoving party
 8 does not make nor provide support for a possible objection, the court will likewise not
 9 consider it).

10 **IV. DISCUSSION**

11 **A. Official Capacity Claims**

12 Defendants first argue that official capacity claims for monetary damages against
 13 Defendants must be dismissed. (ECF No. 32 at 5.) Defendants claim that although all
 14 named individuals in the Complaint were screened out, London sued the named
 15 individuals in their official capacities and because this Court ordered the claim to proceed
 16 against other NDOC Employees, this was done presumably in their official capacities.

17 When the District Court screened London's complaint, only claims for monetary
 18 damages were allowed through. (See ECF No. 7.) Therefore, presumably, the claims
 19 were screened through as personal capacity claims only. See *Mitchell v. Washington*, 818
 20 F.3d 436, 442 (9th Cir. 2016) (Where the plaintiff is seeking damages against a state
 21 official, a strong presumption is created in favor of a personal-capacity suit because an
 22 official-capacity suit for damages would be barred.). To find otherwise would "threaten[]
 23 to ensnare parties who may have simply been confused... and may encourage
 24 gamesmanship by opposing attorneys." *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989,
 25 998 (9th Cir. 2009). This is particularly true when a party is proceeding *pro se* and may
 26 not understand the legal significance between bringing claims in official versus personal
 27 capacities. See *Mitchell*, 818 F.3d at 442. Accordingly, this is not a basis to grant summary
 28 judgment.

1 **B. Failure to Exhaust Administrative Remedies**

2 Under the PLRA, “[n]o action shall be brought with respect to prison conditions
 3 under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail,
 4 prison, or other correctional facility until such administrative remedies as are available are
 5 exhausted.” 42 U.S.C. § 1997e(a). Exhaustion is mandatory. *Porter v. Nussle*, 534 U.S.
 6 516, 524 (2002). The requirement’s underlying premise is to “reduce the quantity and
 7 improve the quality of prisoner suits” by affording prison officials the “time and opportunity
 8 to address complaints internally before allowing the initiation of a federal case. In some
 9 instances, corrective action taken in response to an inmate’s grievance might improve
 10 prison administration and satisfy the inmate, thereby obviating the need for litigation.” *Id.*
 11 at 524–25.

12 The PLRA requires “proper exhaustion” of an inmate’s claims. *Woodford v. Ngo*,
 13 548 U.S. 81, 90 (2006). Proper exhaustion means an inmate must “use all steps the prison
 14 holds out, enabling the prison to reach the merits of the issue.” *Griffin v. Arpaio*, 557 F.3d
 15 1117, 1119 (9th Cir. 2009) (citing *Woodford*, 548 U.S. at 90). Thus, exhaustion “demands
 16 compliance with an agency’s deadlines and other critical procedural rules because no
 17 adjudication system can function effectively without imposing some orderly structure on
 18 the course of its proceedings.” *Woodford*, 548 U.S. at 90–91.

19 In the Ninth Circuit, a motion for summary judgment will typically be the appropriate
 20 vehicle to determine whether an inmate has properly exhausted his or her administrative
 21 remedies. *Albino v. Baca*, 747 F.3d 1162, 1169 (9th Cir. 2014). “If undisputed evidence
 22 viewed in the light most favorable to the prisoner shows a failure to exhaust, a defendant
 23 is entitled to summary judgment under Rule 56. If material facts are disputed, summary
 24 judgment should be denied, and the district judge rather than a jury should determine the
 25 facts.” *Id.* at 1166. The question of exhaustion “should be decided, if feasible, before
 26 reaching the merits of a prisoner’s claim.” *Id.* at 1170.

27 Failure to exhaust is an affirmative defense. *Jones v. Bock*, 549 U.S. 199, 216
 28 (2007). The defendant bears the burden of proving that an available administrative

1 remedy was unexhausted by the inmate. *Albino*, 747 F.3d at 1172. If the defendant makes
 2 such a showing, the burden shifts to the inmate to “show there is something in his
 3 particular case that made the existing and generally available administrative remedies
 4 effectively unavailable to him by ‘showing that the local remedies were ineffective,
 5 unobtainable, unduly prolonged, inadequate, or obviously futile.’” *Williams v. Paramo*, 775
 6 F.3d 1182, 1191 (9th Cir. 2015) (quoting *Albino*, 747 F.3d at 1172).

7 **1. NDOC’s Inmate Grievance System**

8 Administrative Regulation (“AR”) 740 governs the grievance process at NDOC
 9 institutions. To properly exhaust administrative remedies, an inmate must grieve through
 10 all three levels: (1) Informal; (2) First Level; and (3) Second Level. (See ECF No. 32-5.)
 11 First, the inmate must file an informal grievance within six months “if the issue involves
 12 personal property damages or loss, personal injury, medical claims or any other tort
 13 claims, including civil rights claims.” (*Id.* at 11.) The inmate’s failure to submit the informal
 14 grievance within this period “shall constitute abandonment of the inmate’s grievance at
 15 this, and all subsequent levels.” (*Id.* at 12.) NDOC staff is required to respond within 45
 16 days. (*Id.*) An inmate who is dissatisfied with the response to the informal grievance may
 17 appeal to the next grievance level within five calendar days. (*Id.*)

18 This next grievance level is called a “First Level Grievance.” (*Id.*) A First Level
 19 Grievance should be reviewed, investigated, and responded to by the Warden at the
 20 institution where the incident occurred; however, the Warden may utilize any staff in the
 21 development of a grievance response. (*Id.* at 12-13.) The time limit for a response to the
 22 inmate is 45 days. (*Id.* at 14.) Within five days of receiving a dissatisfactory response to
 23 the First Level grievance, the inmate must then appeal to the next level, called the
 24 “Second Level Grievance.” (*Id.*) Officials are to respond to a Second Level Grievance
 25 within 60 days, which must include the decision and the reasons for the decision. (*Id.* at
 26 15.) Once the 60-day time frame expires, or after the inmate receives a response to the
 27 Second Level Grievance, they are considered to have exhausted available administrative
 28 remedies and may pursue civil rights litigation in federal court.

1 **2. Analysis**

2 Defendants assert London failed to properly exhaust his administrative remedies
 3 because he did not grieve the allegations in his Complaint and because he failed to
 4 complete all three required grievance levels. (ECF No. 32 at 6.) Thus, Defendants argue
 5 summary judgment must be entered.

6 In support of this argument, Defendants submitted the documents related to
 7 Grievance Number 2006-30-91033. (ECF No. 32-4.) A review of these documents reveals
 8 as follows. On October 13, 2019, London filed an informal level grievance regarding the
 9 alleged staff assault that occurred on October 9, 2019. (ECF No. 32-4 at 4-9.) There is
 10 no evidence of a response to London's informal grievance included in the record. On
 11 December 12, 2019, London filed a first level grievance stating that NNCC was not
 12 following their own grievance procedure as it took 61 days to respond to his informal
 13 grievance. (*Id.* at 3.) London's first level grievance was not accepted because he changed
 14 the grievance's subject from an alleged staff assault to the grievance procedure's
 15 response time, which was deemed an abuse of the inmate grievance procedure. (*Id.* at
 16 2.) London was explicitly told "Do **NOT** resubmit." (*Id.* (emphasis in original).)

17 A grievance is not fully exhausted until a response is received, or the period for a
 18 response has expired. See AR 740.03(6)-(8) (emphasis added). In this instance, on the
 19 surface and based on the above dates, it appears the timing to respond to the informal
 20 grievance expired without a response ever being received and thus London properly
 21 exhausted his grievance. See *Fordley v. Lizarraga*, 18 F.4th 344, 352 (9th Cir. 2021)
 22 ("[W]here inmates take reasonably appropriate steps to exhaust but are precluded from
 23 doing so by a prison's erroneous failure to process the grievance, we have deemed the
 24 exhaustion requirement satisfied.").

25 Further, to the extent London had not exhausted his grievance after not receiving
 26 a response at the informal level, when London filed his first level grievance and was
 27 explicitly told to not resubmit, this arguably made his administrative remedies
 28 "unavailable." In *Ross v. Blake*, 578 U.S. 632 (2016), the Supreme Court held that §

1 1997e(a) requires an inmate to exhaust only those grievance procedures “that are
 2 capable of use to obtain some relief for the action complained of.” By way of a non-
 3 exhaustive list, the Court recognized three circumstances in which an administrative
 4 remedy was not capable of use to obtain relief despite being officially available to the
 5 inmate: (1) when the administrative procedure “operates as a simple dead end” because
 6 officers are “unable or consistently unwilling to provide any relief to aggrieved inmates”;
 7 (2) when the administrative scheme is “so opaque that it becomes, practically speaking,
 8 incapable of use” because “no ordinary prisoner can discern or navigate it”; and (3) when
 9 prison administrators “thwart inmates from taking advantage of a grievance process
 10 through machination, misrepresentation, or intimidation.” *Id.* at 643–44.

11 Based on the record before the Court, the Court finds Defendants failed to meet
 12 their initial burden on summary judgment to establish that London did not exhaust his
 13 administrative remedies. Thus, the burden does not shift to London to come forward with
 14 evidence to defeat summary judgment. Accordingly, Defendants’ motion for summary
 15 judgment as to exhaustion must be denied.

16 **C. Excessive Force**

17 The Eighth Amendment’s proscription on cruel and unusual punishment forbids
 18 prison officials from inflicting “the unnecessary and wanton infliction of pain” *Whitley*
 19 *v. Albers*, 475 U.S. 312, 319 (1986). Encompassed within the Eighth Amendment is a bar
 20 on the use of excessive force against prisoners. See *Hudson v. McMillian*, 503 U.S. 1, 7-
 21 10 (1992). Courts in the Ninth Circuit apply a five-part balancing test to excessive force
 22 claims: (1) the extent of the inmate’s injuries; (2) the need for application of force; (3) the
 23 relationship between the need and amount of force; (4) the threat reasonably perceived
 24 by prison officials; and (5) any efforts that officials utilized to “temper the severity of a
 25 forceful response.” *Id.* at 7 (quoting *Whitley*, 475 U.S. at 321); see also *Wilkins v. Gaddy*,
 26 559 U.S. 34, 36-38 (2010); *Martinez v. Stanford*, 323 F.3d 1178, 1184 (9th Cir. 2003).

27 The inmate must demonstrate that officials acted maliciously and sadistically to
 28 prevail. “[W]henever prison officials stand accused of using excessive physical force in

1 violation of the [Eighth Amendment], the core judicial inquiry is . . . whether force was
 2 applied in a good-faith effort to maintain or restore discipline, or maliciously and
 3 sadistically to cause harm." *Hudson*, 503 U.S. at 6-7. As the Ninth Circuit has explained,

4 [t]he "malicious and sadistic" standard arose out of "the need to maintain or
 5 restore discipline" inside the prison. When a prison disturbance occurs,
 6 prison officials must make "decisions 'in haste, under pressure, and
 7 frequently without the luxury of a second chance.'" In these situations,
 8 prison officials are "accorded wide-ranging deference" and therefore,
 9 prisoners alleging excessive force must show that the force was applied
 10 "maliciously and sadistically to cause harm."

11 *Wood v. Beauclair*, 692 F.3d 1041, 1049-50 (9th Cir. 2012) (quoting *Hudson*, 503 U.S. at
 12 6 and *Whitley*, 475 U.S. at 320). Thus, the Court must be careful when reviewing the
 13 factors to verify indicia of "such wantonness with respect to the unjustified infliction of
 14 harm as [is] tantamount to a knowing willingness that it occur." *Hudson*, 503 U.S. at 9.
 15 Moreover, there is no need for a showing of serious injury as a result of the force, but the
 16 lack of such injury is relevant to the inquiry. See *id.* at 7-9; *Martinez*, 323 F.3d at 1184;
 17 *Schwenk v. Hartford*, 204 F.3d 1187, 1196 (9th Cir. 2000).

18 Excessive force cases "nearly always requires a jury to sift through disputed factual
 19 contentions, and to draw inferences therefrom," and for this reason, the Ninth Circuit has
 20 "held on many occasions that summary judgment or judgment as a matter of law in
 21 excessive force cases should be granted sparingly." *Santos v. Gates*, 287 F.3d 846, 853
 22 (9th Cir. 2002); see also *Lolli v. Cnty. of Orange*, 351 F.3d 410, 415–16 (9th Cir. 2003);
 23 *Liston v. Cnty. of Riverside*, 120 F.3d 965, 976 n. 10 (9th Cir. 1997) (citing cases).

24 In the motion for summary judgment, Defendants contend there are no allegations
 25 or evidence that they exerted force against London maliciously and sadistically for the
 26 purpose of inflicting harm. (ECF No. 32 at 6-8.) Based on the evidence before the Court,
 27 and in viewing all facts and drawing all inferences in the light most favorable to London,
 28 the Court finds that summary judgment must be denied with respect to the excessive
 force claim for several reasons.

29 ///

1 First, Defendants fail to meet their initial burden in moving for summary judgment
2 to demonstrate that a reasonable juror could not find for London. *Celotex*, 477 U.S. at
3 323. Defendants are thus unable to overcome the initial step in the summary judgment
4 burden-shifting framework. See *In re Oracle Corp.*, 627 F.3d at 387.

5 London's verified complaint alone overcomes Defendants' claim that "no evidence
6 exists" to establish excessive force in this case. Pursuant to Ninth Circuit law, "[a] verified
7 complaint may be treated as an affidavit to the extent that the complaint is based on
8 personal knowledge and sets forth facts admissible in evidence . . ." thus satisfying the
9 *Celotex* affidavit requirement. *McElvea v. Babbitt*, 833 F.2d 196, 197-98 (9th Cir. 1986)
10 (quoting *Lew v. Kona Hospital*, 754 F.2d 1420, 1423 (9th Cir. 1985)).

11 To the extent Defendants argues the Court should discount the facts stated in the
12 complaint, this argument also fails. The Court may not engage in '[c]redibility
13 determinations' or 'the weighing of evidence'" at the summary judgment stage, "as those
14 are functions reserved for the jury." *Manley v. Rowley*, 847 F.3d 705, 711 (9th Cir. 2017)
15 (quoting *Anderson*, 477 U.S. at 255).

16 Therefore, Defendants have failed to meet their initial burden on summary
17 judgment establishing that there was no evidence in the record that the events occurred
18 based on the complaint. On this basis alone, Defendants' motion should be denied as to
19 the excessive force claim.

20 However, even if the Court were to assume Defendants met their initial burden on
21 summary judgment, Defendants' motion must still be denied. Viewing the evidence in the
22 light most favorable to London, the Court cannot say as a matter of law that the force
23 used was not excessive. Based on London's allegations, when London was being
24 removed from his cell for medical observation due to calling a man down, he complained
25 that the cuffs on his wrists were too tight, and he refused to allow officers to shackle his
26 feet. (ECF No. 8 at 3.) Officer Sheeks then yanked the restraint and dragged London to
27 the floor. (*Id.* at 4.) Officer Gonzalez gouged London's eye and then stuck his fingers in
28 London's mouth to try and gouge London's mouth. (*Id.* at 5.) Defendants' own evidence—

1 namely the medical report, which noted a lower gum cut, abrasion of the left eye, and a
 2 swollen right eye—potentially corroborates London’s version of events. (See ECF No. 34-
 3 1 (sealed).) A reasonable jury could determine that the amount of force used to put leg
 4 restraints on London—after he was already out of his cell and restrained—was excessive.

5 It is not the Court’s role to weigh conflicting evidence or make credibility
 6 determinations, but only to determine whether there is a genuine issue of material fact for
 7 trial. *Summers v. A. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997). Further,
 8 the Ninth Circuit has found that the reasonableness of force used is ordinarily a question
 9 of fact for the jury because such cases almost always turn on a jury’s credibility
 10 determinations. See *Liston*, 120 F.3d at 976 n. 10.

11 The Court finds that London has set forth evidence sufficient to raise a genuine
 12 issue of material fact for trial as to whether Defendants’ use of force was “maliciously and
 13 sadistically” applied rather than as part of a “good faith effort to maintain or restore
 14 discipline.” *Hudson*, 503 U.S. at 7. Accordingly, the Court recommends that Defendants’
 15 motion for summary judgment, (ECF No. 32), be denied as to London’s Eighth
 16 Amendment excessive force claim.

17 D. Qualified Immunity

18 The Eleventh Amendment bars damages claims and other actions for retroactive
 19 relief against state officials sued in their official capacities. *Brown*, 751 F.3d at 988–89
 20 (citing *Pennhurst*, 465 U.S. at 100). State officials who are sued individually may also be
 21 protected from civil liability for money damages by the qualified immunity doctrine. More
 22 than a simple defense to liability, the doctrine is “an entitlement not to stand trial or face
 23 other burdens of litigation . . .” such as discovery. *Mitchell v. Forsyth*, 472 U.S. 511, 526
 24 (1985).

25 When conducting a qualified immunity analysis, the Court asks “(1) whether the
 26 official violated a constitutional right and (2) whether the constitutional right was clearly
 27 established.” *C.B. v. City of Sonora*, 769 F.3d 1005, 1022 (9th Cir. 2014) (citing *Pearson*
 28 *v. Callahan*, 555 U.S. 223, 232, 236 (2009)). A right is clearly established if it would be

1 clear to a reasonable official in the defendant's position that his conduct in the given
 2 situation was constitutionally infirm. *Anderson v. Creighton*, 483 U.S. 635, 639–40,
 3 (1987); *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 915 (9th Cir. 2012). The Court may
 4 analyze the elements of the test in whatever order is appropriate under the circumstances
 5 of the case. *Pearson*, 555 U.S. at 240–42.

6 A right is clearly established when the "contours of the right [are] sufficiently clear
 7 that a reasonable official would understand that what he is doing violates that
 8 right." *Serrano v. Francis*, 345 F.3d 1071, 1077 (9th Cir. 2003) (quoting *Anderson*, 483
 9 U.S. at 640). "While there does not have to be a case directly on point, existing precedent
 10 must place the lawfulness of the particular [action] beyond debate," *City of Escondido v.*
 11 *Emmons*, 139 S. Ct. 500, 504 (alteration in original) (quoting *District of Columbia v.*
 12 *Wesby*, 138 S. Ct. 577, 581 (2018) (internal quotation marks omitted)), and must "'squarely govern[]' the specific facts at issue," *Kisela v. Hughes*, 138 S. Ct. 1148, 1153
 13 (2018) (quoting *Mullenix v. Luna*, 577 U.S. 7, 15 (2015)). See *Jessop v. City of Fresno*,
 14 936 F.3d 937, 940–41 (9th Cir. 2019) ("The contours of the right must be sufficiently clear
 15 that a reasonable official would understand that what he is doing violates that right.")
 16 (quoting *Anderson*, 483 U.S. at 640).

17 The plaintiff "bears the burden of showing that the rights allegedly violated were
 18 clearly established." *Shafer v. County of Santa Barbara*, 868 F.3d 1110, 1118 (9th Cir.
 19 2017) (internal quotation marks and citation omitted). However, because resolving
 20 whether the asserted federal right was clearly established presents a pure question of
 21 law, we draw on our "full knowledge" of relevant precedent rather than restricting our
 22 review to cases identified by the plaintiff. See *Elder*, 510 U.S. at 516 (holding appellate
 23 court must review qualified immunity judgment de novo and resolve whether federal right
 24 was clearly established in light of its "full knowledge of its own [and other relevant]
 25 precedents") (alteration in original) (citation omitted). Ultimately, "the prior precedent must
 26 be 'controlling'—from the Ninth Circuit or Supreme Court—or otherwise be embraced by
 27 a 'consensus' of courts outside the relevant jurisdiction." *Sharp v. County of Orange*, 871
 28

1 F.3d 901, 911 (9th Cir. 2017) (citing *Wilson v. Lane*, 526 U.S. 603, 617 (1999)); *see also*
 2 *Wesby*, 138 S. Ct. at 589–90 (“The rule must be settled law, which means it is dictated
 3 by controlling authority or a robust consensus of cases of persuasive authority. It is not
 4 enough that the rule is suggested by then-existing precedent.”) (internal quotation marks
 5 and citations omitted); *Carroll v. Carman*, 574 U.S. 13, 17, (2014) (per curiam) (assuming
 6 without deciding that controlling circuit precedent could constitute clearly established
 7 federal law).

8 Defendants contend they are entitled to qualified immunity because “NDOC
 9 Employees complied with all appropriate ARs and policies and procedures of the NDOC,
 10 and since none of those ARs, policies, or procedures, have been found to be
 11 unconstitutional generally, or specifically as it relates to the factual pattern presented in
 12 this case, qualified immunity applies.” (ECF No. 32 at 9.)

13 While London’s opposition does not identify a particular case that establishes the
 14 rights allegedly violated were clearly established, qualified immunity is still not warranted.
 15 It was clearly established at the time of the incident in question that a prison official
 16 violates the constitution when force is used maliciously or sadistically to cause harm and
 17 not in a good-faith effort to maintain or restore discipline. See *Hudson*, 503 U.S. at 6-7.
 18 Taking the facts in the light most favorable to London, a fact finder could determine that
 19 Defendants violated London’s clearly established rights. For these reasons, Defendants
 20 are not entitled to qualified immunity.

21 **V. CONCLUSION**

22 For good cause appearing and for the reasons stated above, the Court
 23 recommends that Defendants’ motion for summary judgment, (ECF No. 32), be denied.

24 The parties are advised:

25 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of
 26 Practice, the parties may file specific written objections to this Report and
 27 Recommendation within fourteen days of receipt. These objections should be entitled
 28 “Objections to Magistrate Judge’s Report and Recommendation” and should be

1 accompanied by points and authorities for consideration by the District Court.

2 2. This Report and Recommendation is not an appealable order and any
3 notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the
4 District Court's judgment.

5 **VI. RECOMMENDATION**

6 **IT IS THEREFORE RECOMMENDED** that Defendants' motion for summary
7 judgment, (ECF No. 32), be **DENIED**.

8 **DATED:** November 14, 2022.

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UNITED STATES MAGISTRATE JUDGE